GEW/jgo 4/25/2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Petition of Verizon California Inc. for Arbitration Pursuant to Section 252(i) of the Telecommunications Act of 1996 and 47 C.F.R. § 51.809 to Prevent the Adoption of an Alternative Dispute Resolution Clause from another Interconnection Agreement Requested by ICG Telecom Group, Inc. (U 5406-C)	Application 02-02-028 (Filed February 22, 2002)

ARBITRATOR'S RULING DENYING MOTION TO DISMISS PETITION FOR ARBITRATION

1. Summary

Verizon California Inc. (Verizon) seeks arbitration to prevent ICG Telecom Group, Inc. (ICG) from adopting an alternative dispute resolution (ADR) clause from an interconnection agreement between Verizon and another telecommunications company. ICG has moved to dismiss the application for arbitration on grounds that ICG has an absolute right to "opt in" to an ADR clause in another interconnection agreement. This ruling denies the motion to dismiss on the basis that ICG has not shown that an ADR clause, standing alone, qualifies for the opt-in provisions of federal and state law.

2. Background

After lengthy negotiations and a filing by ICG of a petition for arbitration, ICG and Verizon reached agreement on all issues in their proposed interconnection agreement and filed for approval of the agreement on

December 21, 2001. The Commission approved the interconnection agreement on February 7, 2002, as Resolution T-16631.

The day after the interconnection agreement was approved by the Commission, ICG filed its Advice Letter No. 110 to adopt the ADR provision in an earlier interconnection agreement between Verizon and Sprint Communications Company Limited Partnership (Sprint). The Verizon-Sprint ADR provision would replace the dispute resolution provision of the Verizon-ICG interconnection agreement.

Verizon on February 22, 2002, filed its petition for arbitration to prevent ICG from adopting the substitute dispute resolution provision.

3. Governing Law

ICG seeks to adopt the Verizon-Sprint ADR provision based on the "most favored nation" clause of the Telecommunications Act, 47 U.S.C. § 252(i). That clause provides that:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The Federal Communications Commission (FCC) regulation interpreting this clause has been termed the "pick and choose" rule, and it provides in relevant part:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. (47 C.F.R. § 51.809(a).)

Similarly, Rule 7.2(a) of this Commission's Resolution ALJ-181 provides in relevant part that:

> Any individual interconnection, service, or network element arrangement contained in any agreement approved by the Commission pursuant to Section 252 of the Telecommunications Act of 1966, must be made available upon the same rates, terms, and conditions as those provided in the agreement.

The Supreme Court upheld the validity of the FCC's pick and choose rule in *AT&T Corp. v. Iowa Utilities Board* (1999) 525 U.S. 366, stating:

> Respondents argue that this rule threatens the give-and-take of negotiations, because every concession as to an "interconnection, service, or network element arrangement" made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant into the market. A carrier who wants one term from an existing agreement, they say, should be required to accept all the terms in the agreement. Although the latter proposition seems eminently fair, it is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly. (525 U.S. at 395-96.)

4. Discussion

Verizon argues that a party cannot pick and choose a contract provision from one agreement for use in another if that provision does not first quality as an "individual interconnection, service, or network element arrangement." If the provision so qualifies, then it may be adopted "upon the same terms and conditions as those provided in the agreement." Verizon argues that the ADR provision in its Sprint agreement is a "contract" term and not an individual interconnection, service, or network element arrangement.

It is ICG's position that Verizon must make available to ICG the same terms and conditions, and not just interconnection, service or network elements that Verizon makes available to Sprint. In effect, ICG claims that the phrase

"upon the same rates, terms, and conditions as those provided in the agreement" eliminates any distinction between "individual interconnection, service, or network element arrangements" on the one hand and contract terms that have nothing to do with those three categories on the other.

The parties have cited numerous cases to support their positions. The two cases most on point are decisions by two other state commissions.

The Minnesota Public Utilities Commission rejected the position taken by ICG in addressing an arbitration proceeding between Sprint Communications and US West Communications.[1] Like ICG, Sprint argued in that case that any and all individual components of an interconnection agreement must be made available for adoption pursuant to Section 252(i) and 47 C.F.R. § 51.809(a), regardless of the explicit limitation to "individual interconnection, service, or network element" arrangements. The Minnesota Commission stated:

> Nor does a plain reading of the Act support Sprint's position, and that of DPS, OAG, and perhaps, the FCC, that requesting carriers can "pick and choose" any provision out of any agreement that they like. As noted above, 252(i) requires that any interconnection, service, or network element be made available on the same terms and conditions, not that any contract element be made available. Thus, it seems clear, for example, that under the Act there could not be a request for just the performance measures provision of an approved agreement. Instead, a requesting carrier may only request a particular interconnection, service or network element and then be subject to the terms and conditions that specifically apply to that interconnection, service or network element under the

[1] *In re Sprint Communications Company L.P.'s Petition for Arbitration of Interconnection Rates, Terms, Conditions and Price with US West Communications, Inc.,* Minnesota Public Utilities Commission Docket No. P-466/M-96-1097, 1996 Minn. PUC LEXIS 190 (December 19, 1996).

> approved agreement. Those terms and conditions would include such things as the price, quantities, performance standards, points of interconnection, etc., under which the particular interconnection, service, or network element are provided under the approved agreement.[2]

The Indiana Utility Regulatory Commission reached the same conclusion in an arbitration proceeding between BellSouth Cellular and Ameritech, explaining the distinction between "contract elements" and "individual interconnection, services, or network element" arrangements:

> We reject BellSouth's argument that the direct trunking proposal somehow violates Section 252(i). Section 252(i) allows the requesting telecommunications carrier to adopt "any interconnection, service, or network element" from an approved agreement "upon the same terms and conditions as those provided in the agreement." The direct trunking proposal is not a service or network element. Nor is it "interconnection" as defined in the First Report and Order.[3]

Like the contract provision in Minnesota and the direct trunking proposal in Indiana, an ADR clause by definition is not an individual "interconnection," "service," or "network" element subject to adoption under the relevant statute and rules.[4]

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[2] *Id.* At 14-15.

[3] *In re Petition of BellSouth Cellular Corp. Requesting Arbitration of Certain Terms, Conditions and Prices of an Interconnection Agreement with Indiana Bell Telephone Company*, Indiana Utility Regulatory Commission Cause No. 41495-INT 01, 1999 Ind. PUC LEXIS 395 (November 17, 1999).

[4] *See* 47 U.S.C. § 153, *et seq.* and 47 C.F.R. § 51.5.

ICG claims that Verizon has failed to state a proper claim to prohibit an opt-in request, citing the Commission's order in Decision (D.) 01-02-058. ICG is incorrect. In D.01-02-058, Electric Lightwave, Inc. (ELI) sought to adopt the interconnection agreement between Roseville Telephone Company (Roseville) and Pac-West Telecomm, Inc. *in its entirety*. Responding to Roseville's objection that ELI should not be able to adopt terms pertaining to compensation for Internet-bound traffic, the Commission addressed the two exceptions to the right of opt-in set forth in 47 C.F.R. § 51.809(b) concerning cost and feasibility.

In D.01-02-058, therefore, the question was whether a carrier opting into all of the interconnection, service or network elements of another agreement could be precluded from adopting a related payment clause. By contrast, ICG does not seek to opt into an entire agreement between Verizon and another carrier. It seeks instead to opt into a provision of another Verizon agreement that is not an individual interconnection, service or network element arrangement under 47 C.F.R. § 51.809(a).

Similarly, the Supreme Court in *Iowa Utilities Board* did not address the matter at issue here. In that case, incumbent local exchange carriers (ILECs) had argued that the FCC's pick and choose rule contained in 47 C.F.R. § 51.809(a) was unlawful. Specifically, the ILECs asserted that while competitive local exchange carriers were free to adopt an entire interconnection agreement with all of its terms, they should not be permitted to parse out individual terms for adoption because it would deny ILECs the benefit of their bargain. The Supreme Court rejected the ILECs' position, noting that the FCC's rule tracks the pertinent statutory language almost exactly.

The question here, however, is not whether ICG is entitled to adopt individual terms from the Verizon/Sprint Agreement. The Supreme Court has

resolved that question. But the Supreme Court did not hold that "any" term was available for individual adoption under the pick and choose rule. Instead, citing 47 C.F.R. § 51.809(a), it held that an ILEC shall make available individual interconnection, service, or network element arrangements contained in another agreement.

Finally, in support of its position, ICG cites the Fifth Circuit case of *Southwestern Bell Tel. Co. v. Waller Creek Communications, Inc.* (5th Cir. 2000) 221 F.3d 812, and the Tenth Circuit case of *U.S. West Communications v. Sprint Communications Co.* (10th Cir. 2002) 275 F.3d 1251.

In *Waller Creek*, the Fifth Circuit concluded (1) that the pick and choose rule allows a CLEC to adopt *qualifying* individual terms rather than an entire interconnection agreement, and (2) that a CLEC could choose to arbitrate some terms for a new agreement while adopting others pursuant to 47 C.F.R. § 51.809(a). Those conclusions are not at issue here. Indeed, to the extent the court holds that the individual terms that ICG may adopt must first fall within the categories delineated in 47 C.F.R. § 51.809(a), then it would follow that those terms first must qualify as an individual interconnection, service, or network element arrangement. Unlike the dark fiber at issue in *Waller Creek*, the ADR clause that ICG seeks to opt into falls outside those three categories of adoptable terms.

Indeed, in dicta, the Fifth Circuit appears to assume that the opt-in provision will apply to provisions that of necessity carry with them other terms and conditions that an ILEC may or may not want, stating:

> There is nothing inherently unfair in allowing such a[n] [opt-in] procedure. Under the FCC's rules, when a CLEC invokes the [pick and choose] provision, an ILEC can require it to "accept all terms

> that [the ILEC] can prove are 'legitimately related' to the desired term." (221 F.3d at 818; citations omitted.)

The Tenth Circuit in *U.S. West* upheld a state commission's right in its arbitration of an interconnection agreement to grant a LEC's proposal for a "most favored nations" clause in the agreement. That clause, in turn, gave the LEC the right to opt into a tariff (related to interconnection, service or network element) in any other interconnection agreement to which the ILEC was party, provided the LEC agreed to pay any greater costs shown to be incurred by such opt-in. The Tenth Circuit held that both the commission's finding that permitted a "most favored nations" clause, and the language permitting an opt-in for filed tariffs, were within the authority granted by § 252(i). In this case, however, ICG elected to settle, rather than arbitrate, its interconnection agreement with Verizon. Consequently, this Commission was not asked to decide on whether ICG should be permitted to adopt ADR language similar or identical to that in another Verizon agreement. Instead, ICG agreed to ADR language in its Verizon agreement, then sought to substitute other ADR language via an advice letter filing following Commission approval of the parties' agreement for interconnection. Thus, ICG seeks to adopt an ADR clause without first making a showing that the opt-in was authorized by its interconnection agreement with Verizon (as was the case in *U.S.* West) or that the ADR provision qualifies as an individual interconnection, service, or network element arrangement as required by § 252(i).

5. Conclusion

As the moving party in the motion to dismiss the petition for arbitration, ICG has the burden of showing that the petition has no merit. That burden has not been met. The plain language of 47 U.S.C. § 252(i) limits the opt-in provision

to any interconnection, service, or network element provided under another interconnection agreement with the same ILEC, so long as the opt-in is under the same terms and conditions as those provided in the agreement. ICG does not maintain that the ADR clause it seeks to adopt (in substitution for an ADR clause it negotiated with Verizon) is an interconnection, service, or network element. Instead, it appears to agree with Verizon that the ADR clause is a "contract" term independent of the interconnection, service and network element provisions that ICG negotiated with Verizon in their interconnection agreement.

The only cases cited by the parties that appear to be on point are those by the Minnesota and Indiana public utilities commissions, and both of those decisions held against the position taken by ICG. There is no showing that either of these decisions has been appealed or reversed. The court cases cited by ICG, as discussed above, are distinguishable, and none directly address the narrow question at issue in this case.

Accordingly, for the reasons set forth in this ruling, the motion to dismiss the petition for arbitration is denied.

6. Procedural Matters

At the Initial Arbitration Meeting on April 15, 2002, the parties agreed that after an interlocutory ruling on the motion to dismiss, the arbitration rules of Resolution ALJ-181 would apply to this petition for arbitration. Under Rule 3.6 of Resolution ALJ-181, ICG now has 25 days in which to file a response to the petition for arbitration. This ruling affirms that ICG shall file a response to the motion to dismiss within 25 days of the date of this ruling. The hearing process will begin within 10 days thereafter, pursuant to Rule 3.9 of Resolution ALJ-181, with a second Initial Arbitration Meeting to discuss whether the matter may proceed on briefs, or whether an evidentiary hearing and exchange of testimony

are required. A separate order setting the second Initial Arbitration Meeting will issue in due course.

To the extent other motions of the parties are pending, they are taken under advisement pending the second Initial Arbitration Meeting.

IT IS RULED that:

1. The motion of ICG Telecom Group, Inc. (ICG) to dismiss the petition for arbitration of Verizon California Inc. (Verizon) is denied.

2. ICG is directed to file a response to the Verizon petition for arbitration on or before 25 days from the date of this ruling.

Dated April 25, 2002, at San Francisco, California.

/s/ GLEN WALKER

Glen Walker
Administrative Law Judge/Arbitrator

A.02-02-028 GEW/jgo

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Arbitrator's Ruling Denying Motion to Dismiss Petition for Arbitration on all parties of record in this proceeding or their attorneys of record.

Dated April 25, 2002, at San Francisco, California.

/s/ JACQUELINE GORZOCH
Jacqueline Gorzoch

N O T I C E

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